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In the Supreme Court

OF THE

United States

October Term, 1950

No. 115

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals

for the Ninth Circuit.

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In the Supreme Court
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OCTOBER TERM, 1959

No.

JAMES D. CHARLES,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

The petitioner, James D. Charles, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the District of Hawaii, adjudging petitioner guilty on each of four counts of an indictment which charged, in counts one and three, that petitioner acquired and obtained marihuana in violation of Section 4744(a), Title 26, U.S.C. and, in counts two and four,

that petitioner imported such marihuana into the United States in violation of Section 176(a), Title 21, U.S.C.

OPINIONS BELOW

No written opinion was filed by the District Court. The judgment of the District Court is printed in the record, pp. 24-26. The opinion of the Court of Appeals has not as yet been officially reported, but is printed in Appendix "A" hereto, infra, p. 1.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on May 4, 1960. Appendix "B" hereto, infra, p. 6. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

1. Is the Fourth Amendment violated by subjecting a person, while under arrest on misdemeanor charges, to independent and unrelated searches of his person and dwelling for the sole purpose of obtaining evidence of the commission of a different offense?

STATUTES INVOLVED

Amendment IV, Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41, Federal Rules of Criminal Procedure, Title 18, U.S.C.A., provides in part:

* * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained * * *."

(Full text of Rule 41 is set forth in Appendix "C", infra, p. 7.)

STATEMENT OF THE CASE

On September 3, 1958, shortly after 10:30 p.m., five members of the Police Department of Honolulu, a municipality of the then Territory of Hawaii, arrested petitioner at the door of his home upon two warrants sworn out by his wife on charges of threatening and assault and battery. (T 38-39, 41). Petitioner invited the officers inside the house while he read the warrants (T 39). At this time "the usual search, frisking of the

prisoner after being arrested" was made by one of the officers (T 39). One of the officers testified that as he walked into the house he detected a strong odor of marihuana and immediately started checking the ash trays (T 47). Another officer accompanied petitioner's sister-in-law outside the house to an automobile in order to get petitioner's eyeglasses. Upon their return this officer stated to another officer that petitioner was supposed to have marihuana on his person (T 39). The officers then took petitioner into the kitchen and made another search of his person (T 39-40). The testimony is that in this search the officers found a small package containing what appeared to be marihuana. Petitioner was then arrested for the unlawful possession of narcotics (T 40), and a subsequent search of his dwelling revealed a second package of what appeared to be marihuana in the garage (T 41, 82-83). The officers did not have a warrant.

Petitioner's motion to suppress evidence, filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure (T 7-9), was denied (T 7-8). Petitioner's objection to the receipt of the seized articles in evidence, on the same ground, was overruled by the trial court (T 117). Defendant was found guilty on each of the four counts (T 140). Concurrent sentences of time and imprisonment were imposed (T 24-26). The issue on appeal to the Court of Appeals for the Ninth Circuit was reduced to a single question, viz.:

> Did the trial court improperly admit into evidence Exhibits 1 and 2 which had been seized by the officers as a result of their search of petitioner's person and premises?

Jurisdiction for the trial of the offenses charged in the indictment is conferred upon the District Court by Section 3231, Title 18, U.S.C.

The Court below affirmed the judgment of the District Court upon the theory that even though "the record clearly shows that the search of (petitioner's) pockets was designed to uncover narcotics although (petitioner) was not yet under arrest on narcotic charges" and the "purpose of the search was to obtain evidence of a crime different from that for which (petitioner) was arrested", such search was permissible under the Fourth Amendment. (See Appendix "A", infra, pp. 1, 4.)

REASONS FOR GRANTING CERTIORARI.

Clearly the question presented is of importance in the administration of the law of search and seizure. The decision of the Court below holds that a search does not violate the Fourth Amendment even though it specifically finds that the "purpose of the search was to obtain evidence of a crime different from that for which petitioner was arrested". The existence of so broad a power to search without a search warrant has never been suggested by the decisions of this Court.

Judicial sanction of such equivocal methods strikes at the substance of the constitutional right. *Byars v. U. S.*, 273 U.S. 28, 33-34.

Search without a search warrant is sustainable as an incident to lawful arrest only if it is specifically di-

rectal to the instrumentalities or fruits of the crime charged, weapons, and other things to effect an escape from custody. *Abel v. U. S.*, 362 U.S. 217; *Harris v. U. S.*, 331 U.S. 145, 151; *U. S. v. Rabinowitz*, 339 U.S. 56, 61.

An arrest, however lawful, does not empower officers to undertake search of person or premises for the specific purpose of obtaining evidence of commission of a different crime. In *Abel*, supra, 362 U.S., at page 238, this Court stated that the officer arresting on an immigration warrant "was not only not looking for items connected with espionage but could not properly have been searching for the purpose of finding such items". General exploratory searches cannot be undertaken by officers with or without a warrant.

Rabinowitz, supra, 339 U.S. at pages 56, 62.

Probable cause for belief that certain articles subject to seizure are in a dwelling cannot justify search without a warrant. *Jones v. U. S.*, 357 U.S. 493, 498; *Agnello v. U. S.*, 269 U.S. 20, 32. Compare Rule 41(c) of the Federal Rules of Criminal Procedure limiting the issuance of nighttime search warrants, Appendix "C", infra, pp. 7-8. Unlawful search is not validated by what is found. *Miller v. U. S.*, 357 U.S. 301, 312; *U. S. v. Di Re*, 332 U.S. 581, 595.

The decision of the Court below implies that the power to search after lawful arrest is broader than that which exists where a search warrant has been properly obtained under all applicable constitutional limitations and judicial safeguards. Such a doctrine

encroaches upon the basic protection of the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure.

The prohibition of the Fourth Amendment forbids every search that is unreasonable. *U. S. v. Lefkowitz*, 285 U.S. 452, 464; *Gouled v. U. S.*, 255 U.S. 298, 305. There is no formula for the determination of reasonableness. "Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Company v. U. S.*, 282 U.S. 344, 357.

A lawful arrest cannot automatically render constitutional a subsequent independent search for the specific purpose of discovering objects not reasonably related to the cause of the arrest.[2] An arrest must not be used as a pretext to search for evidence. *Lefkowitz*, supra, 285 U.S. at pages 452, 467.

If an officer serving a warrant of arrest is empowered to search contemporaneously for evidence of unconnected crime, then the search warrant procedures of the Fourth Amendment and Rule 41 are circumvented.

A grave question of constitutional right is involved in this case. The possible consequences of the decision of the Court below are so far reaching that this Court should give consideration to the issue presented.

[1] Pertinent testimony as to the facts and circumstances here are contained in Appendix "D", infra, pp. 11-12.

[2] See *Rabinowitz v. U. S.*, C.A.D.C. 1950, 271 F.2d 529, 531, where the accused was arrested for vagrancy and the Court of Appeals said that the subsequent search of his person for narcotics was unreasonable and not incidental to his arrest.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
May 25, 1960.

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(Appendices A, B, C and D Follow)